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NO. 80-1541

In the Supreme Court of the United States

OCTOBER TERM, 1980

EAST CARROLL PARISH POLICE JURY and EAST CARROLL PARISH SCHOOL BOARD, et al.,
Petitioners

versus

STEWART MARSHALL,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

a) Is the plan before the Court a legislative or court ordered plan of reapportionment?

b) If a legislative plan of reapportionment, the decision of the District Court should clearly be affirmed.

c) Even if determined to be a Court ordered or judicial plan of reapportionment, the District Court's decision should be affirmed as the plan approved complies with all constitutional and equitable requirements.

d) The Fifth Circuit Court of Appeals erred in holding that the plan approved by the District Court was adopted to reach an "improper goal", when there is no evidence in the record to support such a conclusion.

e) The decision of the Fifth Circuit Court of Appeals is in direct conflict with *City of Mobile, Ala. vs. Bolden*, 446 U.S. 55, 100 S. Ct. 1490 (1980).

f) Factual findings of the Trial Court are entitled to great weight and should not be set aside unless clearly erroneous.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit rendered on October 31, 1980.

OPINIONS BELOW

The decision of the U.S. Court of Appeals for the Fifth Circuit, rendered on October 31, 1980, is attached hereto as Appendix A.

The appellate judgment reversed a decision of the U. S. District Court for the Western District of Louisiana, rendered on March 1, 1979, which is attached hereto as Appendix B.

JURISDICTION

The decision of the Fifth Circuit Court of Appeals was rendered on October 31, 1980. Petitioner's Petition for rehearing was denied by Order dated January 12, 1981, which is attached as Appendix C.

The Jurisdiction of this Court is invoked under Rule 19.1 (b) of the rules of the Supreme Court of the United States and 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Section One of the Fourteenth Amendment to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S.C. Const. Amend. 14; Sec. 1)

Section One of the Fifteenth Amendment to the United States Constitution provides:

> "Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." (U.S.C. Const. Amend. 15, Sec. 1)

Rule 52(a) of the Federal Rules of Civil Procedure provides as follows:

> "Rule 52. Findings By the Court"
>
> "(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. *Findings of fact shall not be set aside unless clearly erroneous,* and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rule 41(b)." (Emphasis assed). (F.R. Civ. P. 52 (a)).

STATEMENT OF THE CASE

On July 12, 1968, Charles Zimmer sued various officials of Louisiana and East Carroll Parish, alleging that the apportionment of the Police Jury (governing body of the Parish/County) and the school board violated the U.S. Constitution. The District Court adopted a parish at-large election plan. On May 11, 1971, Stewart Marshall intervened on behalf of himself and all black voters in the Parish, arguing that the at-large system approved as a remedy to Zimmer's complaint violated the rights of black residents of the Parish. A panel of the Fifth Circuit Court of Appeals affirmed. *Zimmer vs. McKeithen*, 467 F. 2d 1381 (1972). The Appellate Court, en banc, reversed and remanded on Constitutional grounds. *Zimmer vs. McKeithen*, 485 F. 2d 1297 (1973). The U.S. Supreme Court affirmed, but on the alternative ground that the District Court abused its discretion in approving multi-member districts, absent exceptional circumstances. *East Carroll School Board vs. Marshall*, 96 S.Ct. 1083 (1976).

On remand, the District Court adopted defendant's plan in preference to plaintiff's plan. (Judgment dated June 3, 1976).

Plaintiff appealed, and a panel of the Fifth Circuit reversed, remanding the case for the formulation of a new plan. *Marshall vs. Edwards,* 582 F. 2d 927 (1978). A petition for rehearing was denied (Order dated December 21, 1978), and writs were refused by the United States Supreme Court. (Order dated May 29, 1979).

The case was tried again in the United States District Court, Western District of Louisiana, on March 1, 1979, and the Lower Court adopted a plan prepared and submitted by the defendants. Plaintiff appealed, and the Appellate Court, in a per curiam opinion dated October 31, 1980, reversed and remanded.Rehearing was denied by Order dated January 12, 1981.

FACTUAL BACKGROUND

East Carroll parish is a small, predominately rural Parish in the northeast corner of Louisiana. In 1970 its population was 12,884. Nearly half that number lived in the parish seat,

Lake Providence. At that time, about 55% of the registered voters in the parish were white . A special census was taken in 1976 which revealed that about 60% of the parish population was black. Whites still constituted a slight majority of the registered voters, comprising 51.8% of the total. *Marshall vs. Edwards,* 582 F. 2d 927, 929 (1978).

In April, 1976, the District Court required the parties to submit single member district plans for reapportionment. Each party submitted a plan calling for nine single member districts. Because the population of the parish is concentrated in Lake Providence, each plan divided the Town into at least five districts. Although the plan drew different lines for the rural districts, the controversy between the parties centered on the districts in Lake Providence. *Marshall vs. Edwards,* supra.

Earl K. Selle, defendants' expert, stated that in drawing his plan, he took into account and considered population deviation balances and racial considerations; that he tried to make the districts as concise as possible, and to utilize old ward lines, major highways, natural boundaries and streets in the Town of Lake Providence. (1978 *Marshall* Case, Tr. 19, 38 and 55). He stated that certain jagged district lines were drawn to achieve population deviation balance, and to comply with "fairness" standard of proportional racial representation. (1978 *Marshall* Case, Tr. 55 and 56).

Defendants' plan had a population deviation of 6.2%; plaintiff's plan had maximum deviation of 9.7%, but provided straighter district boundaries within Lake Providence. *Marshall vs. Edwards,* 582 F.2d 927, 931, 1978.

Defendants' plan, which was approved by the District Court, provided districts with the following racial population composition:

District 1:	55%	white	45%	black
District 2:	78%	white	22%	black
District 3:	49%	white	51%	black
District 4:	72%	white	28%	black
District 5:	55%	white	45%	black
District 6:	14%	white	86%	black
District 7:	1%	white	99%	black
District 8:	36%	white	64%	black
District 9:	7%	white	93%	black

Marshall vs. Edwards, 582 F.2d 927, 931, (1978).

On Appeal, the Appellate Court found the plan to be a court ordered plan, to be judged by equitable standards, and that equitable standards did not permit a district court to approve a plan based on racially proportional representation.

The case was remanded, and Judge Dawkins, on March 1, 1979 approved a plan submitted by defendants. Plaintiff appealed, and on October 31, 1980, the Appellate Court reversed.

ARGUMENT

A writ of certiorari should be granted in this case, to review the decision of the Fifth Circuit Court of Appeals, on the following grounds:

A. *The plan before the Court is a legislative, rather than a Court ordered or judicial plan of reapportionment.*

In the District Court, plaintiff submitted a plan, the Court appointed expert submitted a plan, and the Police Jury and School Board submitted a plan that had been adopted at a special joint meeting called just for that purpose.

A joint reapportionment committee, headed by E.H White, President of the School Board, met and worked out two plans. Notice was given, the meeting was called, and a special joint meeting of the two public bodies was held on February 9, 1979. The committee made its report, then the School Board and Police Jury passed resolutions "to *adopt* redistricting reapportionment plan A, and Plan B as an alternate, and to submit plan A and alternate plan B to the Federal District Court in Shreveport on or before February 14, 1979." (Defendants' Exhibits D-2 and D-3).

These were legislative acts, the two public bodies exercised legislative judgements, reflecting the policy choices of the elected representatives of the people of the parish. This is a legislative, rather than a judicial plan. See *Wise vs. Lipscomb*, 98 S.Ct. 2493 (1978), and *Burns vs. Richardson*, 86 S.Ct. 1286 (1966).

In both *Wise* and *Burns* the Supreme Court held the plans proposed by the Hawaiian Legislature, and the Dallas City Council, must be considered "legislative plans", even though neither body had the power to reapportion itself.

B. *If a legislative plan of reapportionment, the decision of the District Court should clearly be affirmed.*

The question is not whether a court could do a better job of apportionment, but whether the plan was constitutional. It is not the Court's function to substitute its views for those of the elected public bodies, if the bodies have exercised a legitimate and constitutional legislative judgment. *Kelly vs. Bumpers*, 340 F. Supp. 568, aff'd, 93 S.Ct. 3047, (1972).

As stated in *Wise vs. Lipscomb*, 98 S. Ct. 2493 (1978):

> "The Court has repeatedly held that redistricting and reapportioning legislative bodies is a legislative tasks which the federal courts should make every effort not to preempt. (cases cited)" P. 2497.

In *White vs. Weiser*, 93 S. Ct. 2348 (1973), this Court stated:

> "From the beginning, we have recognized that reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so. (cases cited). We have adhered to the view that state legislatures have 'primary jurisdiction' over legislative reapportionment. (cases cited). " P. 2354

And as stated in *City of Mobile, Ala. vs. Bolden*, 100 S.Ct. 1490 (1980), action by a state that is racially neutral on its face violates the *Fifteenth Amendment* only if motivated by a discrimimatory purpose; only if there is purposeful discrimination can there be a violation of the equal protection clause; and past discrimination cannot, in the manner of original sin, condemn government action that is not itself unlawful.

C. *Even if determined to be a Court ordered or judicial plan of reapportionment, the District Court's decision should be affirmed, as the plan approved complies with constitutional and equitable requirements.*

The plan adoped by the District Court provides for districts which are compact and contiguous; natural, political and traditional boundaries are preserved as much as possible. The plan complies with "one-man, one-vote" criteria, and does not dilute the potential voting strength of the black registration minority, population majority. The plan complies with constitutional and equitable requirements, satisfies all guidelines set forth by the Fifth Circuit in *Marshall vs. Edwards*, 582 F.2d 927 (1978), and the decision of the District Court should be upheld.

A member of the police jury, Brown Nelson, was called as a witness to explain the plan adopted by the District Court. Mr. Nelson had not come to be a witness, he happened to be the only member of the Joint Reapportionment Committee present in court. (Tr. 26).

He stated the Committee tried to straighten the lines in the City of Lake Providence as much as possible; they did not want to disturb the deviation range too much, and wanted the districts compact. (Tr. 44 and 45).

His committee had the same population data and other material the experts had, and the plan adopted had a population deviation of 5.1%. (Tr. 45).

Mr. Brown testified on cross-examination as follows:

A. "We discussed it and saw there could be some lines that appeared to be jagged. We discussed straightening out the lines with no respect to color to try to come to some plan that had straighter lines and try to keep the deviation range in the limits we had." (Tr. 47).

* * *

A. ". . . it increased the population in favor of the blacks in some districts. In some districts the blacks were increased."

Q. "And those district were heavily black?"

A. "No, in one case one was predominately white and it went to a predominately black district." (Tr.48).

* * *

A. ". . . we didn't bother the rural area. We thought those were good compact districts bordered by natural boundaries and the deviation range was good." (Tr. 54).

Defendants' plan-A, approved by the District Court, has a maximum population deviation of 5.1%, and provides districts with the following composition:

Election District	Total Pop.	Total White	Total Black	%W	%B	Deviation
1	1350	739	611	55	45	+2.9
2	1335	1035	300	78	22	+1.8
3	1336	662	674	50	50	+1.9
4	1297	935	362	72	28	-1.0
5	1292	595	697	46	54	-1.4
6	1332	171	1161	13	87	+1.6
7	1281	2	1279	.02	99.98	-2.2
8	1289	427	862	33	67	-1.6
9	1295	152	1143	12	88	-1.2
TOTALS:	11807	4718	7089			

MEDIAN POPULATION: 1311

DEVIATION RANGE: 5.1

The prior plan provided 5 predominately black districts, ranging from 51% to 99% black; and 4 predominately white districts, ranging from 55% to 78% white.

The plan approved by the District Court also provided for 5 predominately black districts, ranging from 54% to 99% black, but only 3 predominately white districts, ranging from 55% to 78% white. District 3 is shown on Defendant's chart as 50% white, 50% black, but is actually 49.55 white and 50.45 black.

Mr. Nelson testified that the Reapportionment Committee straightened out the crooked lines of the former plan, kept the population deviation low, and made the districts compact. (Tr. P. 44 and 45).

The plan was draw *without* regard to *color.* (Tr. P. 47). They formulated a plan that removed the jagged lines that had been drawn in the previous plan to provide for proportional racial representation. They removed those features which had made the prior plan unacceptable.

In *City of Mobile, Ala. vs. Bolden,* supra, this Court held that for a plan to be invalid for discriminatory reasons, there must be a racially discriminatory motivation, or a purposefully discriminatory denial or abridgment of the right to vote. There is no evidence of such motive or purpose in this case.

A Federal District Court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions, or in the reapportionment plans proposed by the public bodies.

> "In fashioning a reapportionment plan or in choosing among plans, a district court should not preempt the legislative task nor 'intrude upon state policy any more than necessary." (cases cited)
>
> * * *
>
> "THE REMEDIAL POWERS OF AN EQUITY COURT MUST BE ADEQUATE TO THE TASK, BUT THEY ARE NOT UNLIMITED. Here the District Court erred in so broadly brushing aside state apportionment policies without solid constitutional or equitable grounds for doing so." *White vs. Weiser,* 93 S.Ct. 2348 (1973), P. 2355.

At the very least, some additional consideration is given reapportionment plans which have a "legislative genesis". *Graves vs. Barnes*, 446 F. Supp. 560 (1977).

D. *The Fifth Circuit Court of Appeals erred in holding that the plan approved by the District Court was adopted to reach an "improper goal", when there is no evidence in the record to support such a conclusion.*

In its per curiam opinion, the Fifth Circuit states that the plan adopted was a judicial plan "that was adopted to reach an improper goal", and there is simply no evidence in the record to support such a finding.

E. *The decision of the Fifth Circuit Court of Appeals is in direct conflict with City of Mobile, Ala. vs. Bolden, supra.*

In *Zimmer vs. McKeithen*, 485 F. 2d 1297 (1973), the Fifth Circuit held that a reapportionment plan was constitutionally defective if, designedly or not, the plan minimized or cancelled voting strength of racial or political elements of the voting population. The focus was held to be on *actual effect*, not motive.

City of Mobile, Ala. vs. Bolden, supra, reversed *Zimmer vs. McKeithen*, supra.

In *City of Mobile, Ala.*, this Court held that for a reapportionment plan to be constitutionally infirm, it must be motivated by a discriminatory purpose, there must be an "invidious purpose", "purposeful discrimination", and that:

> "A plaintiff must prove that the disputed plan was 'conceived or operated as a purposeful device to further racial discrimination. (cases cited)." P. 1499.

The Court pointed out that no decision of the U.S. Supreme Court supported the view that disproportionate effects alone established unconsitiutional racial voter dilution. (P. 1500 and 1501).

In *City of Mobile, Ala.*, this Court stated:

> "The District Court assessed the appellees' claims in light of the standard that had been articulated by the Court of Appeals for the Fifth Circuit in *Zimmer vs. McKeithen*, 485 F. 2d 1297. That case, coming before *Washington vs. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597, was quite evidently decided upon the misunderstanding that it is not necessary to show a discriminatory purpose in order to prove a violation of the Equal Protection Clause - that proof of a discriminatory effect is sufficient. See 485 F. 2d, at 1304 - 1305, and N. 16." P. 1502

THE FIFTH CIRCUIT STILL LABORS UNDER THE MISTAKEN BELIEF THAT IT IS NOT NECESSARY TO SHOW A DISCRIMINATORY PURPOSE – THAT PROOF OF EFFECT IS SUFFICIENT.

The *City of Mobile, Ala.* case was cited and argued to the Fifth Circuit, and although no mention was made of the *Mobile* decision in the Court's judgment, dated 10/31/80, in its order

denying the petition for rehearing, dated 1/12/81, the Court stated:

> "We add the following footnote to the penultimate paragraph of our prior per curiam opinion:
>
> "[1] For this case, the dilution test as explained in *Zimmer vs. McKeithen*, 485 F. 2d 1293, 1305-1306 (5th Cir. 1973), is still authoritative after *City of Mobile, Ala. vs. Bolden*, 446 U.S. 55, 100 S. Ct. 1490, 64 L. Ed. 47 (1980). CF. *Kirksey vs. City of Jackson Miss.*, 625 F. 2d 21 (5th Cir. 1980).

In this case, the Fifth Circuit continues to adhere to the dilution test, or end results theory, that it enunciated in *Zimmer vs. McKeithen*, even after this approach has been rejected by the *Mobile* decision.

Amazingly, the Fifth Circuit cites as authority for following *Zimmer vs. McKeithen*, the case of *Kirksey vs. City of Jackson, Miss.*, 625 F. 2d 21 (1980), one of its own decisions, which acknowledged that *Zimmer* had been overrulled, and refused to follow it.

In *Kirksey* the same Fifth Circuit which in the present case still adheres to *Zimmer* stated:

> "It is apparent to us that the fact findings that were made by the Trial Court were based on criteria developed in *Zimmer vs. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), affirmed on other grounds sub nom, *East Carroll Parish School Board vs. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L. Ed. 2d 296 (1976) whose further validity is now very much in question in light of the recent Supreme Court opinion in *City of Mobile vs. Bolden* _____U.S.____, 100 S.Ct. 1490, 64 L. Ed. 2d 47 (1980).

> We have many times held that fact findings that were made under the spell of legal principles, which were either improper or since then declared to be improper, really can't be credited one way or the other." (P.22).

It seems the Fifth Circuit is still "under the spell" of the *Zimmer* case, but only as applied to this particular litigation, and recognizes that it no longer applies elsewhere.

Is *Zimmer* or *Mobile* the law of the land? Does one rule apply in East Carroll Parish, Louisiana, and another elsewhere?

Mobile requires that plaintiff prove discriminatory purpose. There is no such proof in the instant case, and the decision of the Lower Court should be affirmed.

F. *Factual findings of the Trial Court are entitled to great weight and should not be set aside unless clearly erroneous. F.R. Civ. P. 52(a).*

The Trial Judge heard the witnesses, reviewed the maps and charts, and held that the plan adopted and submitted by the public bodies met all constitutional and equitable standards. For plaintiff to prevail, the burden of proof was on him to show purposeful discrimination. There is no such proof in the record, and the decision of the Lower Court should be affirmed.

CONCLUSION

Writs of certiorari should be granted in this case for the following reasons:

1. The plan before the Court is a legislative plan of reapportionment which clearly meets all constitutional standards, and it was error for the Court of Appeals to reverse the District Court's acceptance of the plan.

2. Even if determined to be a Court ordered or judicial plan of reapportionment, it meets all equitable standards, and the decision of the District Court should be affirmed.

3. It was error for the Court of Appeals to hold that the reapportionment plan was adopted to reach an "improper goal", when there is no evidence in the record to support such a conclusion.

4. The decision of the Fifth Circuit Court of Appeals is in direct conflict with *City of Mobile, Ala. vs. Bolden,* supra.

5. The factual findings of the District Court are entitled to great weight, and should not have been set aside unless clearly erroneous.

WHEREFORE, petitioners pray that a writ of certiorari be granted in this case, that the decision of the Court of Appeals

be reversed, and the decision of the District Court upheld.

Respectfully submitted,

GEORGE F. FOX, JR.
301 Morgan Street
Lake Providence, Louisiana 71254
Tel. No. 318-559-2608

ATTORNEY FOR PETITIONERS

PROOF OF SERVICE

I hereby certify that all parties required to be served with copies of the foregoing petition have been served, and in particular that three copies of the foregoing petition for writ of certiorari have been served upon petitioner in the above captioned case by mailing copies of same to his Attorney of record, Stanley A. Halpin, Jr., at his address at 806 Perdido Street, Suite 401, New Orleans, Louisiana 70112, with sufficient postage affixed, this 10th day of March, 1981.

_____

GEORGE F. FOX, JR.

ATTORNEY FOR PETITIONERS

APPENDIX -A

Charles F. ZIMMER, Plaintiff,

v.

Edwin W. EDWARDS et al.,

Defendants-Appellees,

v.

Stewart MARSHALL,

Plaintiff-Intervenor-Appellant.

No. 79-1987.

United States Court of Appeals

Fifth Circuit

Oct, 31, 1980.

After remand following reversal of a decision of the district judge ordering a judicial reapportionment plan, 582 F.2d 927 and denial of rehearing, 588 F.2d 828, appeal was taken from a decision of the United States District Court for the Western District of Louisiana, Benjamin C. Dawkins, Jr., J., which adopted a reapportionment plan for the same parish. The Court of Appeals held that reapportionment plan for a Louisiana parish was adopted to reach an improper goal of racial proportionality and therefore would not be approved.

Reversed and remanded.

COUNTIES 38

Reapportionment plan for a Louisiana parish was adopted to reach an improper goal of racial proportionality and therefore would not be approved.

Appeal from the United States District Court for the Western District of Louisiana.

Before CHARLES CLARK, TJOFLAT, and GARZA, Circuit Judges.

PER CURIAM:

This reapportionment case is again before us, and again, we must reverse the decision of the trial judge.

The facts and litigation history of this case are described in *Marshall v. Edwards*, 582 F.2d 927 (5th Cir. 1978). That panel reversed the decision of the district judge, ordering a judicial reapportionment plan for this same parish. Judge Wisdom stated:

> The district judge must be mindful of the impact of the proposed plans on different racial groups. His duty to avoid both gerrymanders and racial dilution requires that much. The judge must analyze the plan and determine that the probable results are such that minority strength

> is not diluted. But this legitimate concern with the outcome cannot justify a strict proportionality brought about by manipulation of district lines. If the plan passes the dilution test, as explained in *Zimmer [v. Mc Keithen*, 5 Cir. 1973, 485 F.2d 1297], *Kirksey [v. Board of Supervisors of Hinds County*, 5 Cir. 1977, 554 F.2d 139], and *Nevett v. Sides*, 5 Cir. 1978, 571 F.2d 209, race is no longer an important factor. The boundaries should be drawn with an eye to compactness, contiguousness and the preservation of natural, political, and traditional boundaries; *not* racially balanced representation.

Id. at 937 (emphasis in original).

On remand, the trial judge again adopted a plan proposed by the East Carroll Parish Police Jury and School Board instead of a plan proposed by Marshal . Marshall claims that the plan adopted by the court exceeds de minimis population deviations and minimizes black voting strength. As in our prior decision, we do not consider this latter claim.

Under the standards set out in our prior opinion, the plan adopted is a judicial plan that was adopted to reach an improper goal. *See Marshall*, 582 F.2d at 938 n.11. At oral argument Marshall suggested that the remedy in this case should take into account results of the 1980 census. We agree. On remand, the trial judge should evaluate any plans submitted in light of the

1980 census results, devise its own plan or order new plans to be developed if necessary, and adopt or approve a plan following the instructions in our prior mandate, 582 F.2d 927 (5th Cir. 1978). Specifically, the trial judge should avoid approving a plan that has odd-shaped districts (such as district five in the plan adopted by the Parish Police Jury and School Board) that are explainable only in terms of racial proportionality.

The judgment of the trial court is reversed, and the cause remanded for further proceedings.

REVERSED and REMANDED.

APPENDIX - B

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

STEWART MARSHALL,
Plaintiff-Intervenor
versus
EDWIN W. EDWARDS, ET AL
Defendants

CIVIL ACTION NO. 13.927

JUDGMENT
and
ORDER

This matter came on for hearing on March 1, 1979, and after considering the evidence, it is hereby

ORDERED that the East Carroll Parish Police Jury and School Board hereby are apportioned into nine single-member districts according to Plan A submitted by the defendants as shown on maps and block description attached hereto, as per verbal description to be filed by the Special Master within fifteen days of the date of this Order.

IT IS FURTHER ORDERED that elections for all members of the East Carroll Parish Police Jury and School Board shall be conducted under the plan ordered herein on the dates of the regularly scheduled elections for the Police Jury in 1979, and those persons so elected shall be issued their Commissions and take office as soon as feasible after said elections are final.

IT IS FURTHER ORDERED that all other election officials of the Parish and State shall take whatever action necessary to expedite this Order, including opening qualifications, certifying candidates, and issuing Commissions

IT IS FURTHER ORDERED that members of the School Board shall be elected for terms of two, four, and six years as follows:

District 1 –	4 years
District 2 –	6 years
District 3 –	2 years
District 4 –	6 years
District 5 –	2 years
District 6 –	2 years
District 7 –	6 years
District 8 –	4 years
District 9 –	4 years

and thereafter shall be elected for six year terms at times scheduled for School Board elections in accordance with State law.

IT IS FURTHER ORDERED that maps and verbal description of the districts of the plan approved herein be caused by defendants to be published in a newspaper of general circulation in the Parish, together with the dates for qualification of candidates and primary and general elections.

IT IS FURTHER ORDERED that defendants are bound *in solido* and shall pay the Court costs, the costs of the Special Master, the fee of plaintiffs' expert witness (Dr. Gordon Henderson) in the amount of $892.50, and the attorney's fee of plaintiffs' counsel in the amount of $3,750.

THUS DONE AND SIGNED, in Chambers, at Shreveport, Louisiana, this 1st day of March, 1979.

/S/ BEN C. DAWKINS, JR.
BEN C. DAWKINS, JR.
UNITED STATES
SENIOR
DISTRICT JUDGE

MINUTE BOOK
UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
SHREVEPORT DIVISON

Thursday *March 1, 1979*

Court met pursuant to adjournment at 10:00 A.M.

PRESENT: HON. BEN C. DAWKINS, JR., JUDGE, PRESIDING
Sidney Young, Court Reporter
Carolyn L. Luce, Minute Clerk

Stuart Marshall, et al * *Appearances:*

Vs. No. CI-13927 Civil * *Stanley A. Halpin, Jr., for Plaintiff*

Edwin Edwards, East Carroll Police Jury, et al * *George F. Fox, for Defendants*

*

Case came on for hearing on reapportionment. Proposed plans of reapportionment were presented by Plaintiffs, Special Master Kenneth Selle, and the governing bodies of East Carroll Parish.

IT WAS ORDERED that Plan A prepared by the governing bodies of East Carroll Parish be adopted. The Court fixed compensation of Dr. Gordon Henderson, Plaintiffs' expert witness, at the sum of $892.50, and compensation of Plaintiffs' counsel at $50.00 per hour for 75 hours of work, written decree to be presented for signature this date.

At 2:50 P.M. it was ordered that Court before Judge Dawkins be adjourned.

APPENDIX C

Charles F. ZIMMER, Plaintiff,

v.

Edwin W. EDWARDS et al.,

Defendants-Appellees,

v.

Stewart MARSHALL,

Plaintiff-Intervenor-Appellant.

No. 79–1987.

United States Court of Appeals,

Fifth Circuit.

Jan. 12, 1981.

Appeal from the United States District Court for the Western District of Louisiana; Benjamin C. Dawkins, Jr., Judge.

ON PETITION FOR REHEARING

AND REHEARING EN BANC

(Opinion October 31, 1980, 629 F.2d 425 [5th Cir.])

Before CHARLES CLARK, TJOFLAT and GARZA, Circuit Judges.

PER CURIAM:

We add the following footnote to the penultimate paragraph of our prior per curiam opinion:

[1] For this case, the dilution test as explained in *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 – 1306 (5th Cir. 1973), is still authoritative after *City of Mobile, Alabama v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L. Ed2d 47 (1980). Cf. *Kirksey v. City of Jackson Mississippi*, 625 F.2d 21 (5th Cir. 1980).

The petition for rehearing is DENIED, and no member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule16), the petition for rehearing en banc is DENIED.

80-1541

NO.

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

EAST CARROLL PARISH POLICE JURY and
EAST CARROLL PARISH SCHOOL BOARD, et. al.,
Petitioners,

versus

STEWART MARSHALL,
Respondent.

TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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(504) 566-0336

Attorney for Respondent

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

QUESTIONS PRESENTED

1. Whether the case is moot due to the promulgation of the 1980 Decenial Census.

2. Whether the decision of the Court of Appeals conflicts with this Court's decision in *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

3. Whether the Court of Appeals clearly erred in determining that the 1979 redistricting plan in question was a court-ordered rather than a legislatively enacted plan.

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IN THE
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EAST CARROLL PARISH POLICE JURY and
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versus

STEWART MARSHALL,

Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent prays that this Court deny the Petition for Writ of Certiorari sought by Petitioners to review the decision of the United States Court of Appeals for the Fifth Circuit, rendered on October 31, 1980.

STATEMENT OF THE CASE

In earlier rounds of litigation in this case the Court of Appeals, *en banc*, held that at-large elections, proposed by the Defendant-Petitioners and ordered by the District Court, violated the Constitution. *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973). This Court affirmed on the alternative non-Constitutional ground that since this was a Court-ordered plan, single-member districts were to be preferred absent exceptional circumstances. *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). On remand, the District Court called for the parties to submit proposed plans. The Defendant bodies passed resolutions approving a plan to be submitted to the Court. The plan was not submitted to the pre-clearance procedures required by Section 5 of the Voting Rights Act of 1965, for plans legislatively enacted. The District Court approved, as a remedy the plan proposed by Defendants and ordered it into force. The District Court did not refer the plan back to the governing bodies for legislative enactment. On appeal, the Fifth Circuit in *Marshall* v. *Edwards*, 582 F.2d 927 (1978) carefully applied the standards of *Wise* v. *Lipscomb*, 437 U.S. 535 (1978) and found the plan to be court-ordered rather than legislatively enacted. The use of contorted lines to achieve a pre-conceived racial ratio was held to go beyond the bounds of equitable appropriateness in court-ordered plans. East Carroll Parish then sought a Writ of Certiorari in this Court, on grounds virtually identical to those

in their present petition, and the Writ was denied on May 29, 1979. The case was, thus, once again returned to the District Court to follow the standards of equitable appropriateness in selecting a court-ordered plan. Once again, the District Court called for the parties to submit proposed plans of redistricting and he appointed a Special Master to recommend the appropriate remedy. Once again, the Defendants passed resolutions submitting their proposed plan to the Court. Once again, they did not seek Section 5 review of their plan, which would be necessary to give it the force of law. Once again, the Defendants' position in the District Court was that the plan did not have to be subjected to Section 5 scrutiny, because whatever plan was approved by the District Court would become a court-ordered plan, not subject to Section 5. The District Court preceded on this premise and after a remedial hearing at which Plaintiffs, Defendants, and the Special Master presented their proposed plans, the District Court selected the plan proposed by the Defendants. The District Court issued no Findings of Fact and Conclusions of Law, but only a Judgment and Order stating that "the East Carroll Parish Police Jury and School Board *hereby are apportioned*" according to the plan "*submitted*" by the Defendant-Petitioners (emphasis supplied).

The plan was not submitted to Section 5 review but was immediately put into force. No stays were sought or issued and elections were and continue to be conducted pursuant to this plan.

This plan is in force and will continue in force, until it is replaced by a new plan employing the now available 1980 census figures.

Your respondent Marshall appealed from the unsupported Judgment and Order of the District Court, on grounds that the District Court continued to ignore the standards of equitable appropriateness. Equitable standards, Marshall contended, were violated by the District Court (without assigned reasons) selecting as a remedy the plan proposed by Defendants, which in all significant respects was identical to that disapproved in *Marshall* v. *Edwards*, 582 F.2d 927 (1978), over a plan recommended by the Special Master: which followed the guidelines of that opinion; which respected compactness and contiguity, as well as natural, political, and traditional boundaries; which approached perfect population equality; and which did not employ jagged and contorted lines. The Court of Appeals agreed in its October 31, 1980 opinion. The Court of Appeals, however, noted that the 1980 census results would soon be available, and that any remedial plan now should be based on that data. Accordingly, the Court of Appeals remanded the case for evaluation of new plans devised with the 1980 census data, cautioning the Court to follow its earlier mandate.

REASONS FOR DENYING THE WRIT

I. *The Case is Now Moot by Virtue of the Promulgation of the 1980 U.S. Census.*

The controversy in the Court of Appeals below involved the proper delineation of single-member districts. The question of at-large elections was settled by earlier rounds of litigation. The single-member district plan now operable in East Carroll Parish (the plan supported by Defendant-Petitioners and ordered by the District Court in its March 1, 1979 Judgment and Order) was based upon 1970 Census data. The plan recommended by the Special Master to the District Court and the plan supported by Plaintiff-Respondent Marshall were also based upon the 1970 Census data. The 1980 Census was distributed to the state governments on April 1, 1981. Plaintiff's counsel has obtained that data, which shows population changes and shifts in East Carroll Parish which would necessitate redrawing the plan in force as well as the plan of the Special Master and the plan proposed by Plaintiff. The controversy over the plans drawn in accordance with the 1970 Census is dead. The Court of Appeals foresaw this likelihood when it remanded the case to the District Court to reconsider the proper delineation of single-member districts in light of the 1980 Census and in accordance with the Court's prior mandate. Given the posture of the case, your respondent respectfully submits that the case is not appropriate to be reviewed by a Writ of Certiorari and that the Court would have questionable jurisdiction over the case. A better disposition would be to allow the District Court to reconsider the case in light of the 1980 Census, as the Court of Appeals directed. For these reasons, the Writ of Certiorari should be denied.

II. *The Decision Below does not Conflict with this Court's Recent Decision in City of Mobile v. Bolden, 446 U.S. 55 (1980).*

Petitioners urge as a prime reason for granting the Writ that the decision below conflicts with this Court's recent decision in *City of Mobile* v. *Bolden,* 446 U.S. 55 (1980). Such is clearly not the case due to the applicability in Louisiana of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973.

A redistricting plan for a jurisdiction covered by Section 5 may not be enforced without Section 5 approval, unless it is a Court-ordered plan. *Connor* v. *Johnson,* 402 U.S. 690, 692 (1971). In the instant case, if the plan ordered into force by the District Court was not a "Court-ordered" plan (as Petitioner now contends), the plan would be subject to the requirements of Section 5 review. The plan in question has never been submitted for Section 5 review and if it were considered a "legislatively enacted" plan, it would be unenforceable due to the lack of Section 5 approval, without ever having to reach the Constitutional questions considered in *Mobile* v. *Bolden.*

III. *The Court of Appeals did not Clearly Err in Determining that the 1979 Redistricting Plan in Question was a Court-Ordered Rather than a Legislatively Enacted Plan.*

The redistricting plan ordered in force by the District Court, herein, is clearly a "Court-ordered" plan under the criteria of this Court's decision in *Wise* v. *Lipscomb*, 437 U.S. 535 (1978). At issue in *Wise*, was a redistricting plan adopted by the City Council of Dallas, Texas after an unappealed decision declaring its former at-large plan unconstitutional. The trial court "afforded the city an opportunity as a legislative body for the City of Dallas to prepare a plan which would be constitutional." 437 U.S. at 538. The Dallas Council availed itself of the opportunity and passed a resolution which stated that the Council intended to *enact an ordinance* which would create a new plan of election. That plan was the subject of a hearing by the District Court which concluded that the plan was constitutionally acceptable. The City Council then formally enacted the ordinace. The District Court entered a subsequent written order approving the City plan as a valid legislative act. *Lipscomb* v. *Wise*, 399 F. Supp. 782 (N.D. Tex. 1975). Section 5 of the Voting Rights Act did not apply to Texas at the time of this case.

It was under these circumstances, that this Court in *Wise* found the Dallas plan to be legislatively enacted rather than Court-ordered. The circumstances of the instant case are vastly different from those in *Wise*. The Court of Appeals in *Marshall* v. *Edwards*, 582 F.2d 927, 932-933, carefully reviewed the criteria of *Wise*, applied it to the District Court's last effort to devise a plan, and found the plan to be Court-ordered. On remand,

the District Court made another attempt to devise an adequate plan under circumstances identical to those in its earlier effort: the Court called for proposals and even appointed a Special Master to make a recommendation; the governing bodies made a proposal by resolution which did not purport to enact the plan, but only to propose it to the Court; counsel for the governing bodies again took the position at the hearing that the plan had not been enacted, so it did not have to be submitted pursuant to Section 5; the District Court again clearly understood that it was developing a Court-ordered plan, rather than hearing a constitutional challenge to a legislative plan; the District Court's Order purported to put the plan immediately into effect without legislative enactment or Section 5 approval; the plan was viewed by the District Court, counsel for Defendants, and counsel for plaintiffs as a Court-ordered plan which was exempt from Section 5 review; and the plan was never submitted to Section 5 review. Under these circumstances, the Fifth Circuit, in its October 31, 1980 decision below, again found the plan to be a Court-ordered plan subject to the standards of equitable appropriateness.

Defendant-Petitioners reliance upon deference to the factual findings of the District Court in this regard, is misplaced. The District Court issued no Findings of Fact and Conclusions of Law as is required in injunctive rulings. More importantly, throughout the proceedings the District Court fully understood (as did the parties) that the hearing was to produce a Court-ordered plan which was not subject to Section 5 review and which need not be enacted by the governing bodies.

The crux of this matter is that the Defendants are again (as they did in *Marshall* v. *Edwards*) trying to characterize the plan to this Court as legislatively enacted, after having carefully taken all the steps to insure that the plan was Court-ordered in the District Court and even conceding in the District Court that the plan was "Court-ordered" in order to escape Section 5 review. Defendants-Petitioners are simply playing ducks and drakes with the judiciary. The plan in question was clearly properly characterized by the Court of Appeals as "Court-ordered" under any reasonable interpretation of *Wise*. The Writ should be denied as not presenting an issue of a magnitude worthy of review.

CONCLUSION

The Writ of Certiorari should be denied in this case for for the following reasons:

1. The case is moot by virtue of the promulgation of the 1980 U.S. Census.

2. The decision below does not conflict with this Court's decision in *Mobile* v. *Bolden* because of the applicability in Louisiana of the pre-clearance procedures of Section 5 of the Voting Rights Act to post-1964 legislatively enacted redistricting plans.

3. The decision below properly applied the standards of *Wise* v. *Lipscomb*, to conclude that the plan in question was a Court-ordered plan subject to the standards of equitable appropriateness.

The only issues presented by this case are stale and moot and are controlled by the peculiar facts of this case rather than being of a magnitude which would be worthy of this Court's grant of a Writ of Certiorari.

Respondent Marshall respectfully prays that the Writ of Certiorari sought herein be denied.

Respectfully submitted,

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ATTORNEY FOR RESPONDENT

CERTIFICATE

I, Stanley A. Halpin, Jr., Attorney for Respondent and a member of the Bar of the United States Supreme Court, do hereby certify that on this 22nd day of May, 1981, I served copies of the foregoing Response to Petition for Writ of Certiorari upon the attorney of record for Petitioners herein, Mr. George F. Fox, Jr., by mailing three copies of same, postage prepaid to him at his office at 301 Morgan Street, Lake Providence, Louisiana 71254.

STANLEY A. HALPIN, JR.
Counsel for Respondent.